

1 KAREN P. HEWITT
United States Attorney
2 SAMUEL W. BETTWY
Assistant U.S. Attorney
3 California State Bar No. 94918
U.S. Attorney's Office
4 880 Front Street, Room 6293
San Diego, California 92101-8893
5 Telephone: (619) 557-7119
Facsimile: (619) 557-5004

6 Attorneys for Federal Respondents
7

8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
10

11 DMITRI VALLERVEICH
TATARINOV,

12 Petitioner,

13 v.

14 SUPERIOR COURT OF THE
15 STATE OF CALIFORNIA,
COUNTY OF SAN DIEGO; et al.,

16 Respondents.
17

Case No. 07cv2033 L (NLS)

**EX PARTE REQUEST FOR
FUTHER CONSIDERATION OF
THE COURT'S SUBJECT
MATTER JURISDICTION**

18 I

19 INTRODUCTION

20 Notwithstanding that the Ninth Circuit Court of Appeals had already entered a
21 final decision on the merits of his final removal order, Petitioner Tatarinov petitioned
22 this Court to vacate his 1996 and 1998 state court convictions and, in the interim, to stay
23 execution of his final order of removal. On May 7, 2008, this Court noted that it lacked
24 jurisdiction to review Petitioner's final order of removal, but entered an order granting
25 Petitioner's request for a stay of the execution of that final order of removal. However,
26 this Court lacks jurisdiction under the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231,
27 Div. B (May 11, 2005), to consider either the challenge to Petitioner's final order of
28 removal or, in the interim, to stay execution of that order.

II

DISCUSSION

Because all that remains in Petitioner's immigration case is the execution of the final order of removal, the Court lacks jurisdiction to address Petitioner's request for a stay. See 8 U.S.C. § 1252(g) (“notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter”) (emphasis added). Under the REAL ID Act, habeas review is available only over challenges to detention that are independent of challenges to removal. See H.R. Rep. No. 109-72 (2005), reprinted in 2005 U.S.C.C.A.N. 240, 300 (stating “section 106 would not preclude habeas review over challenges to detention that are independent of challenges to removal orders. Instead, the bill would eliminate habeas review only over challenges to removal orders.”). See also Iasu v. Smith, 511 F.3d 881, 886-87 (9th Cir. 2007) (affirming that the sole and exclusive means under REAL ID Act for alien to challenge his order of removal based on claim of United States citizenship was by filing petition for review of removal order with Court of Appeals; thus, district court lacked jurisdiction to address such claim on federal habeas review); Puri v. Gonzales, 464 F.3d 1038, 1041 (9th Cir. 2006) (holding that the REAL ID Act strips the district court of jurisdiction where claim challenges an order of removal).

The Court granted a stay of removal on the basis of Petitioner’s collateral attack on the underlying state court convictions that render him deportable because, the Court ruled, he had raised a serious legal issue about whether he had been denied counsel as contemplated by Gideon v. Wainwright, 372 U.S. 335 (1963). This determination, although not permissible under the REAL ID Act, may have been inadvertently invited because, in its Return, the Federal Respondents had argued, in the alternative, that the Court was prohibited from reviewing collateral attacks on removal orders, with the

1 exception of Gideon claims. However, in light the REAL ID Act’s clear language, the
 2 rare Gideon exception—to the extent that it exists in immigration proceedings at all—could
 3 only have been raised in, and considered by, the Court of Appeals. This Court should
 4 not have reached the alternative argument, because it lacks subject matter jurisdiction
 5 under the REAL ID Act and other jurisdiction-limiting statutes. As provided by 8 U.S.C.
 6 § 1252(a)(5), “a petition for review filed with an appropriate court of appeals in
 7 accordance with this section shall be the sole and exclusive means for judicial review of
 8 an order of removal entered or issued under any provision of this Act, except as provided
 9 in subsection (e)”).^{1/} See also 8 U.S.C. §§ 1252(b)(9) (“no court shall have jurisdiction,
 10 by habeas corpus under [28 U.S.C. § 2241], or . . . by any other provision of law
 11 (statutory or nonstatutory), to review . . . questions of law and fact . . . arising from any
 12 action taken or proceeding brought to remove an alien from the United States under this
 13 subchapter. . .”); Brito-Lopez v. Mukasey, No. ED CV 07-181-AHM, 2008 WL 793573
 14 at *2 n. 4 (C.D. Cal. Mar. 24, 2008):

15
 16 Petitioner contends that after the Court vacates the state conviction, the
 17 Court can order respondents to vacate the Immigration Judge's removal
 order and vacate the execution of the removal order. . . The REAL ID Act
 would prevent this Court from doing so.

18 Id.

19
 20 ^{1/} Any challenge to Petitioner’s removal order must be directed to the applicable
 21 court of appeals under the REAL ID Act. 8 U.S.C. § 1252(a)(5), as amended by § 106(a)
 22 of the REAL ID Act, provides:

23 Notwithstanding any other provision of law (statutory or nonstatutory), including
 24 section 2241 of Title 28, or any other habeas corpus provision, and sections 1361
 25 and 1651 of such title, a petition for review filed with an appropriate court of
 26 appeals in accordance with this section shall be the sole and exclusive means for
 27 judicial review of an order of removal entered or issued under any provision of
 28 this chapter, except as provided in subsection (e) of this section. For purposes of
 this chapter, in every provision that limits or eliminates judicial review or
 jurisdiction to review, the terms “judicial review” and “jurisdiction to review”
 include habeas corpus review pursuant to section 2241 of Title 28, or any other
 habeas corpus provision, sections 1361 and 1651 of such title, and review
 pursuant to any other provision of law (statutory or nonstatutory).

8 U.S.C. § 1252(a)(5).

1 Indeed, Petitioner has already received judicial review of the removal order before
2 the Ninth Circuit in Tatarinov-Valereveich v. Gonzales, 220 Fed. Appx. 609, 2007 WL
3 572154 (9th Cir. 2007), and he has pursued his ineffective-assistance-of-counsel claims
4 in the state courts and in Tatarinov v. Superior Court of the State of California,
5 02cv2029-W (BEN) (S.D. Cal.) (pre-REAL ID Act habeas proceeding), and Tatarinov
6 v. Gonzales, 05-56021 (9th Cir.). Moreover, any issues or challenges Petitioner could
7 have, but did not, raise in his petition for review before the Ninth Circuit are forever lost.
8 See Martinez-Serrano v. INS, 94 F.3d 1256, 1258 (9th Cir. 1996).

9 III

10 CONCLUSION

11 Because the Court lacks jurisdiction to review Petitioner's order of removal and
12 lacks authority to grant a stay of the execution of Petitioner's removal order, the Federal
13 Respondents request further briefing on the issue of this Court's subject matter
14 jurisdiction under the REAL ID Act. Alternatively, Federal Respondents ask that the
15 Court reconsider its order granting a stay of Petitioner's removal. See Hajek v.
16 Burlington Northern R.R. Co., 186 F.3d 1105, 1107 (9th Cir. 1999) (concerning the
17 authority of a court to consider its own jurisdiction sua sponte).

18 DATED: May 16, 2008

19 Respectfully submitted,

20 KAREN P. HEWITT
United States Attorney

21 s/ *Samuel W. Bettwy*

22 SAMUEL W. BETTWY
23 Assistant United States Attorney

24 Attorneys for Federal Respondents